ORIGINAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CASEY CLARKSON, on behalf of himself and all other similarly situated, Plaintiff, vs. ALASKA AIRLINES, INC., HORIZON AIR INDUSTRIES, INC., and ALASKA AIRLINES PENSION/BENEFITS ADMINISTRATIVE COMMITTEE, Defendants.	Case No. 2:19-CV-00005-TOR August 4, 2020 Telephonic Motion Hearing Pages 1 - 44

BEFORE THE HONORABLE THOMAS O. RICE
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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Proceedings reported by mechanical stenography; transcript produced by computer-aided transcription.

(Court convened on August 4, 2020, at 10:02 a.m.)

THE COURTROOM DEPUTY: The matter before the Court is *Casey Clarkson v. Alaska Airlines, Incorporated, et al.*, Case No. 2:19-CV-0005-TOR, time set for motion hearing.

Counsel, please state your presence for the Court and record beginning with the plaintiff.

MR. BARTON: Good morning, your Honor. This is Joseph Barton on behalf of the plaintiff. Also on the phone with me is Thomas Jarrard and my client, Casey Clarkson.

THE COURTROOM DEPUTY: Counsel, for the defendants, please state your presence for the record.

MR. METLITSKY: Your Honor, this is Anton Metlitsky along with Mark Robertson and Tristan Morales.

THE COURT: Good morning, Counsel. This is Judge Rice. I've reviewed the entire file, and I'm prepared to hear your oral argument.

It appears to me that we've got this one pending motion, the motion for class certification. And when we conclude that, it appears to me that we should resolve, as well, the pending motion to amend the jury trial scheduling order.

So if you could, be prepared for that after we resolve the class certification issue.

Mr. Barton, will you be speaking for the plaintiff?

MR. BARTON: I will, your Honor.

THE COURT: All right. I'll hear from you. Don't

repeat everything in your memorandum as I've read everything. I'll have some questions for you. Go ahead and begin.

MR. BARTON: Certainly. As your Honor knows, we're seeking to certify two sets of classes. They're probably likely very overlapping classes with really two sets of claims. There's a Count IV, which is the Paid Leave claim.

I don't know, your Honor, if you can -- if you can hear -- there's an echo that, at least, the parties are hearing. I'm not sure if you're hearing that, as well.

THE COURT: I'm turning down some of our speakers. It may be some feedback from our microphones in the courtroom, but I can hear you.

MR. BARTON: Okay. So let me continue.

There's two sets of claims: The Paid Leave claim and a Paid Leave Class on behalf of Count IV, which, essentially, alleges that both Alaska and Horizon have violated USERRA. There is a quality principle under 4316 by failing to provide paid short-term military leave while providing paid leave for certain other types of comparable leave.

The second class is the Virtual -- what we call the Virtual Credit Class, which is Counts I through III, that is solely asserted against Horizon alleging that Horizon violated USERRA by implementing what they call a Virtual Credit Policy that credited pilots and flight attendants with less credit when they took military leave than they would have had they worked or even

if they had -- even if they'd worked less than the minimum guarantee by providing them less credit for military leave than they would have received for the minimum guarantee.

THE COURT: Mr. Barton, let me interrupt you. This is Judge Rice.

I see there's -- there's three different allegations: Counts I through III. And I read that or the summary of it. I haven't gone back to the statute and read the statute word for word.

Are there differences in those three allegations?

MR. BARTON: Obviously there are slight differences. The essential allegation is that they -- when -- when people -- when pilots or flight attendants took military leave, they returned. They were re-employed with a different status or position or denied seniority or rights that they should have had.

And the basic principle is that they should have been returned to work and treated as if they had not left work when they were on military leave. That's the general, overall principle.

THE COURT: What you're seeking, though, is just one remedy, isn't it? It's three different ways of saying the same thing for one remedy.

MR. BARTON: Yeah. I mean, obviously, you can have a wrong that implicates three different legal rights; and that's

really what you have here.

THE COURT: All right. And then you seek to certify this class for a time period May 1st, 2017, through date of Judgment. But Mr. Clarkson doesn't work for Horizon. So how can I certify it that far in the future?

MR. BARTON: So the answer to that is really -- the policy is, essentially, the same. They changed the matrix slightly, and this really -- the question then becomes, you know, is he typical of the other employees still subject to that policy?

THE COURT: Well, he's not typical because he doesn't work there.

MR. BARTON: Well, he is -- he has claims. I mean, this is -- he has claims. Claims for harm that he suffered that we think are entitled to monetary remedies as a result and so are all the people that have been harmed by this policy and that's --

THE COURT: But they changed their policy in 2018, and he left --

MR. BARTON: Well, I think -- go ahead, your Honor.

THE COURT: No, go ahead. He left November 6th, 2017; and they changed their policy in 2018. Why should I interpret their new policy when he's not an employee? He can't represent a class that he's not even a part of.

MR. BARTON: So, your Honor, this is -- they did not

actually change the policy. The policy remains the same. They changed the amount of credit, but the amount of credit -- I mean, that's -- that's -- the policy itself stays the same. It's a question of whether or not they are providing less credit when you take military leave. People are still being harmed by this policy.

And so it's not that they've changed the policy. They've merely changed -- they've altered the formula slightly with respect to the pilots. And what they've done is they've distinguished between people who just take -- they give more credit now for people who take five days or less, but there's still a discrepancy for people who take more than five days of military leave. The policy itself is the same. The harm is still the same. So the -- the difference is -- and the -- and the harm to both he and other people are that they're all being harmed by the same policy, a policy that happens to continue.

But the fact that he has left Horizon doesn't change the fact that, if he proves that this is the policy that they have in terms of providing less credit when you take military leave than you would have been at work, it proves the violation with respect to people who continue to be employed there.

It's no different than if you had a discriminatory policy that said, "Don't hire people based on a certain type of color," and I left employment and I had received less pay because of my race or age (Connection Chime Interruption) the fact that I have

left and the policy still stays the same, even though they might have increased the amount that they pay the same people in my position, doesn't change the fact that there is an ongoing policy that still continues to harm people.

And I think this is the -- the argument the defendants have raised is really an argument about prospective relief, but that's a different argument. We're not seeking -- there's not a request for prospective relief in there. Their argument really becomes, well, if you certify this class, somehow people will be -- the absentee class members will be prejudiced, essentially, because they won't have a claim for prospective relief. In the cases that -- the *Wal-Mart* case that they rely on, there's a slightly different thing -- situation that was going on there.

In *Wal-Mart* what they had done is there were two sets of monetary relief; and, in order to certify under (b)(2), they basically gave up or were willing -- had not asserted claim for that particular type of relief or did not seek that particular type of monetary relief. And that would have precluded people, essentially, on a -- from -- the argument went that that would have precluded people from obtaining these past economic remedies for monetary relief. That's a different situation.

There's no preclusion here and there's a type of symptom -- there's no harm. So if we were to go to trial in February 2021 and obtain a remedy -- a damages remedy -- and the defendants

continue to have this policy that they -- the same one that they challenged and it continued in 2022, there'd be no preclusion from somebody asserting a claim again and saying, "Well, you now owe me damages for that policy as a result of asserting this in 2022 or seeking prospective relief." And that's really the argument the defendants have made.

Moving on to the rest of the -- I want to focus on where the defendants challenge portions of the elements rather than elements that are unchallenged. With respect to the Virtual Credit Class, the only other two things the defendants challenge is whether joinder is impracticable and the second issue is whether common issues predominate.

In order to make the argument this is an insufficient number of people, the defendants really do three things. One is they want you to ignore the size of the class. They make an argument that small classes can't be certified; and that, of course, is not the case. The number of people in the class is not the only thing -- the only consideration.

The second thing, your Honor, is they impermissibly shrink the size of the class. They assume the class ends in February 2018. They also make this argument that -- and we -- in terms of what the size is, and they make an argument that someone has to actually suffer a demotion. And I think, as Mr. Clarkson's experience, himself, illustrates, in -- the first time that he went out on leave and was affected by this policy adversely, he

did suffer a reduction in terms of what his status was. In both instances, he was required to work more -- more hours in order to make the -- the number of hours he was required to make. And in October, when he knew the policy would affect him, in order to avoid the reduction in status, he ended up working more hours in order to able to keep the status.

The harm in that situation, your Honor -- and this is why the harm also applies even if people have not had their status actually reduced -- is that other people would have worked more hours in order to keep the status had they worked those hours and been treated the same or provided the proper amount of credit under the Virtual Credit Policy. What would have happened -- and if they'd worked those extra hours, they would have received premium pay. Essentially what is overtime pay as part of the negotiated contract. So there's really two different types of harm here, and so you can't simply look at whether people went out.

And if you look at the entire class period that we've asserted, there's more than 40 people. There's more than sufficient size of the class here.

The defendants also make an argument that Mr. Clarkson cannot represent the flight attendants; and their argument primarily is that because Mr. Clarkson has never had a discussion with the flight attendants. But there's no require -- when we doesn't have personal knowledge of their

policy. But that's not an element. It's not a requirement. The defendants don't cite any case law. We cite a number of cases in our brief. There is simply no requirement that a class representative has to have personal knowledge of the effects or the situations of other class members. They're simply not required to know that.

They're -- what they're required to know is a sufficient understanding of their own claims, and that they don't contest with respect to Mr. Clarkson.

THE COURT: Mr. Barton, I had a question there. Does the flight attendants have a different Collective Bargaining Agreement that treats virtual credit different?

MR. BARTON: Well, they do have a different virtual -- they do have a different Collective Bargaining Agreement. Their own witnesses conceded that those -- the Virtual Credit Policy is effectively the same. So although it appears in a different CBA, or Collective Bargaining Agreement, the -- it works the same way. And that's why it -- the class can be certified to include flight attendants, as well.

THE COURT: And then you indicated that it shouldn't just apply to demotion because he worked extra hours.

MR. BARTON: Correct, your Honor.

THE COURT: And then you equate that with overtime pay, and I don't see why he would get overtime or premium pay.

MR. BARTON: So the way that the Collective Bargaining

Agreement works, if once you've worked a certain amount of -- it's not overtime pay in terms of an FLSA. But under the terms of the CBA, once you've worked X number of hours -- if he -- he's required to work -- be available to work X number of hours. Once he exceeds that, under the -- under the terms of the Collective Bargaining Agreement, he is then entitled to what's called "premium pay." It's the equivalent of overtime pay is the way to think about it.

And so he did not receive that. He had to work the extra hours to make the minimum guarantee; but because he worked these extra hours and they didn't properly credit the time he was out on military leave, he had to work extra hours to make the minimum guarantee. Had they properly credited it, he would have received premium pay.

So he either would have not had to work the hours or, if he had to work the hours, he would have gotten premium pay.

Does that make it clear, your Honor?

THE COURT: Well, it does. I understand your argument. How am I supposed to word that class definition?

MR. BARTON: I think -- well, the answer, your Honor, is I think the class definition is -- is appropriately defined. Defendants haven't taken issue with respect to our -- the way we've defined the class. They've sort of tried to narrow in terms of what they think the harm is.

THE COURT: Well, let me just give you an example.

We've got an individual that takes military leave. He's given virtual credit, but he had more than 70 hours already. It didn't affect him, he didn't have to work extra, and he wasn't demoted. Your definition would make him a class member when, in fact, he suffered no injury.

MR. BARTON: And the fact -- I mean, the Ninth Circuit has said the fact that the class definition may include people who have not suffered any actual monetary harm does not -- you know, does not undermine the class definition.

THE COURT: I know. I was just --

MR. BARTON: It's acceptable -- yeah.

THE COURT: Well, I was just trying to provide some definition to it so that we're not sending out notices to everybody that isn't even -- that isn't even harmed and then weed those out and come up with only a handful of people. I just need to be able to provide some definition to the class itself.

So it's either those who were demoted or were forced to work extra hours. Is that correct?

MR. BARTON: Yes, your Honor. I think that's -- you could modify the class definition in that way. I mean a simple way, which sometimes the Courts do, is to add the language "and were harmed thereby."

THE COURT: All right.

MR. BARTON: But I think the way that you have

captured it is another way to put it, as well.

THE COURT: All right. Continue.

MR. BARTON: Certainly. The other element that the defendants contest is predominance of whether or not -- and they argue that individual issues will predominate. And they claim that resolving the claims will require, quote, "mini trials" although they don't identify what needs to be decided in the mini trials other than, perhaps, damages, which does not undermine predominance.

The entirety of their argument, as I can tell, is based on the assumption that the class member would actually need to be demoted to succeed on the claims. And what they're really arguing about is whether or not you can sufficiently identify the members of the class and how do you go about doing that? But the Ninth Circuit and another Court in this District has made clear that that exercise, identifying who is -- who is a member of the class, who -- and -- and class membership, is an issue about class membership. It is not a membership -- I'm sorry, not an issue about predominance.

And the defendants only cite two cases on predominance with respect to the Virtual Credit Claim. One is a District Court case that involved questions of -- individual questions of reliance. It's of questionable validity given the Ninth Circuit law on that issue.

And then another anti-trust -- and an anti-trust case where

the plaintiff's expert had assumed a pass-on in an anti-trust case. And once the Court -- once the expert refined his opinion -- his opinion, the Court certified the class. These are very distinguishable cases.

The defendants -- the defendants make the argument that determining who is a member of the class would require individualized analysis, but the defendants' own witness -- their 30(b)(6) representative -- acknowledged all this information is contained in defendants' own records. They had not -- at least as of the date of the class certification motion, had not yet produced that data.

But what Courts, including this Court, have recognized is that when you've got -- when the proof that you need is contained in business records, that does not undermine predominance. That is generalized proof that satisfies predominance.

And so what defendants are really left with with respect to this argument is an issue that purely addresses damages, which does not defeat predominance, or an issue that resolves or addresses inclusion of who's in -- or who's included in the class, which also does not defeat predominance.

Moving on to the Paid Leave Claim. Defendants' central argument is really that they challenge the fact that there are multiple written policies and whether or not a class that includes multiple written policies can be certified. And their

issue does not concern certification of a pilot-only class. They appear to concede that a class is on behalf of the American and -- and Horizon pilots, so long as Mr. Clarkson has standing, can be certified.

What they fail to understand, though, is that -- that a practice -- a policy does not have to exist in a single document. The Ninth Circuit has repeatedly rejected that. And where there are practices that are common, where there's a course of conduct that the defendants have used even if they're set forth in multiple written policies at multiple facilities, classes can be certified as a result.

What defendant -- with respect -- and the defendants challenge three elements on Rule 23(a): Commonality, typicality, and adequacy. And then they challenge predominance on the -- on the Paid Leave Claim, as well. They do not challenge that there's sufficient numbers with respect to the Paid Leave Class.

What the defendants are trying to argue -- and they try to make an analysis or analogy to *Wal-Mart v. Dukes*. But in that case, the company had a specific policy against having uniform practices. And there was no specific employment practice that the plaintiff was able to identify.

That is very different from this case. There is a uniform practice across the workgroups and across the two companies. And the uniform practice is that there are a set of paid leave

practices for what we contend is comparable leave and a practice across the company of providing no paid leave for short-term military leave. That's the common practice.

The common issue -- and when you look at commonality, the question has to be: What are the elements and what do you have to look at?

So the common issues here are whether these leaves are comparable and whether this practice violates USERRA. In order to determine comparability, which is really going to be the fact question that goes before the jury, there's a DOL regulation that sets forth what are the elements. Those are the duration of leave, the purpose, and the voluntariness of the leave.

Defendants cite a case -- the *Hoefert* case, which confirms that's what you're looking for. Defendants' own witnesses testified that the purposes for these leaves are the same across the groups, the voluntariness does not vary across the groups, and defendants' witnesses conceded not only that the date -- the duration would be determined by data but they were unaware of any differences among the groups in terms of the durations of the leave as to why duration of the leave would vary across the groups.

THE COURT: Mr. Barton, I'm going to interrupt you here. So play this out. We take it to a jury. Are we gonna have to introduce all the Collective Bargaining Agreements for the eight different categories of employees in order to show

comparability as to, for instance, jury service or some -- some other leaves because they're treated differently in each of the Collective Bargaining Agreements and they're treated differently at various times, as well?

MR. BARTON: I think that -- if you go through, I think the witnesses are fairly clear that the leaves are actually fairly consistent over time. I think there are slight differences in terms of the policies, certainly, in terms of what -- in terms of the Collective Bargaining Agreements or the language of the agreements. But that's really -- that doesn't address the factors that need to be addressed by the jury in terms of what make -- whether these particular types of leaves or whether a particular type of leave is comparable to military leave. And those really go to the three elements in the DOL regulations.

THE COURT: All right. My follow-up question is: How can he be a representative all the way back to October 10th, 2004, when he began work November 23rd, 2013, for Horizon?

MR. BARTON: Because there's a similar policy and the defendants' own witnesses were consistent that the policies that have been in place have been in place essentially the same since 2004. And so he's challenging a practice, even though it existed before the time that he started, on behalf of other people. This is not a question -- this is -- this is the difference between does he have standing versus whether or not

he is an adequate or typical class representative. That -- that secondary question is really what we're looking at here. He's not bringing claims on behalf of himself going back to 2004, but he's challenging a policy that is effectively the same as the one that he was subject to that goes back to 2004. So long as the policies were essentially the same, he's challenging the same practice that exists -- has existed back to 2004. That is why he can challenge -- he can -- he's an appropriate class presentative.

I would say it's the same thing as if I -- I purchased a stock that there was an existing fraud, and the fraud dated back -- and assume I had no statute of limitations problem -- back to 2004, whatever time prior to the time I actually purchased the stock. The essential claim is that there was a -- there was a fraud that existed and it inflated the price of the stock; that it preexisted my purchase; and my purchase was affected by that fraud. I can represent people who purchased days, weeks, years before since the beginning of the fraud so long as the fraud and the overall practice is the same. It's the same course of conduct.

The same would be true for an anti-trust case. The anti-trust conspiracy preexisted my purchase that harmed me. Even though it was going on for years, I can represent those people.

Same thing would be true in terms of a consumer case where

I'm challenging a practice that they've had so long as we're within the statute of limitations. It's the practice that has been going on even though the practice preexists the time that I was harmed.

And that's why -- so long as the practice is the same, the overall course of conduct is the same, that's why he's an appropriate class representative to go back to 2004 even though it predates when he was personally harmed.

Moving on to typicality, the standard with respect to typicality -- and I think this also addresses your question -- is if the standard is: Is it reasonably coextensive? What the Ninth Circuit has said it need not be substantially identical.

And defendants identify or make two arguments. One is that pilots are not typical of non-pilots because pilots take more military leave and two is they identified scheduling -- how scheduling leave is different for pilots than for some other groups. So I think it would probably be similar to the flight attendants.

The question of whether or not a particular group -- and, particularly here, defendants claim the pilots take more military leave. The only thing that means is more leave means they have more damages. But damages -- increased amount of damages among the class or even among the plaintiff does not defeat typicality. And the merely -- merely the fact that the plaintiff's claim is great than other class members also does

not defeat typicality.

Defendants also want to argue -- make an argument about the frequency by which the pilots take military leave. But frequency is not one of the factors that they -- the Department of Labor regulations identify. They want to confuse frequency with duration. But they cite no case under -- in this context, which is considered frequency. The case that they actually cite actually considered duration of the leave, not the frequency of the leave.

They do cite a case involving a discrimination case, but it's a -- it's a very different context. We're not talking about comparability there. We're talking about a very different situation and a very different claim under 4311, not 4316. And the defendants' own witnesses conceded that frequency with respect to leave is different than duration. The comparable leaves might have limits on duration, but none of the leaves have any limits on frequency.

With respect to the pilot's schedule, they argue that there's differences here; but none of those differences, again, address the factors that are at issue in this case. The relevant factors, which are the duration, voluntariness, and purpose and typicality -- and they ignore -- the typicality refers to the nature of the claim, not the specific facts from which it arose. Immaterial fact differences do not undermine typicality.

And what -- the defendants' own witnesses conceded that military leave was unpaid for all employee groups since 2004, and they -- and the relevant factors have been uniform across the workgroups.

So, at bottom, what defendants are arguing about are differences in damages and not factors that are -- that ultimately affect typicality.

Defendants repeat their argument with respect to Mr. Clarkson's adequacy that they made with the Virtual Credit Policy and making an argument that he's not personally familiar with the leave policy for -- for class members other than pilots. But there's no authority. They cite no authority. And as one case said -- cited -- explicitly stated there is no authority for the proposition that class members must have personal knowledge with respect to other class members' circumstances in order to represent the class. And we cite multiple places that say that.

What's required and what Mr. Clarkson has is he has a very good familiarity with his own claims, and they don't dispute that he has sufficient familiarity with his own claims.

The final issue with respect that -- that defendants dispute is whether common questions predominate. They argue here that there are significant differences between pilots and non-pilot groups, but they don't identify anything that's a material difference between the groups that affects the evidence

that's required to prove the claim. And that's the critical thing. It's what the Supreme Court said in *Halliburton;* what the Ninth Circuit case -- *Walker* also said the assessment of predominance begins with the elements of a cause of action, and they ignore what the elements of the cause of action is.

The central question here that will go to the jury is whether military leave is comparable to the other forms of paid leave. Again, I know I sound like a broken record; but it's the DOL regulations -- the factors that the DOL considers -- those things are similar. They're similar across the groups. They've not identified any differences across the groups with respect to the factors that are contained within the DOL regulation.

And they don't explain anything with respect to how scheduling or anything else affects the ultimate determination that the jury and this Court will have to make.

Let me just address very briefly anything that I've touched on with respect to standing that I haven't yet covered. They make these arguments as to why Mr. Clarkson does not have standing as to either the Virtual Credit Class or the Paid Leave Claims.

I think I've largely covered the Virtual Credit Claims. And as to the Paid Leave Claim, they assume, based on nothing in the Complaint, that it's solely based on differential pay. But as the *Brill* case explained in a case involving comparability of leaves that, if the comparable leave provides full pay, then

that is an appropriate remedy. So arguments that the defendants might have as to whether at certain points of time Mr. Clarkson received more money from the military really are irrelevant as to his standing.

Unless the Court has further questions --

THE COURT: No, I don't. Let's hear from the defense.

MR. METLITSKY: Thank you, your Honor. Anton Metlitsky for the defense. I hear an echo. Can -- can you hear me?

THE COURT: I can. Are you on a speakerphone or how are you speaking?

MR. METLITSKY: I -- I am on a speakerphone. Unfortunately, I don't have a headset where I am. Maybe it will help if I bring the speakerphone closer?

THE COURT: Or maybe further away.

MR. METLITSKY: Or maybe further away. How's that?

THE COURT: It's better now.

MR. METLITSKY: Okay. Good. I'll -- I'll stand here then. Thank you. Thank you, your Honor.

So if I could, I'd like to, basically, go in reverse order from the way Mr. Barton went and start with standing and more general -- or, generally, the adequacy of the plaintiff to represent any of these classes, then go to the (Audio Connection Gap) class and the inability to certify a non-pilot -- a class involving non-pilots, and then the Virtual Credit Class.

So on standing, I think Mr. Barton left out a (Audio Connection Gap) point that we made in our brief. Some of the -- I'd like to start first with --

THE COURT: Mr. Metlitsky, I can't hear you now.

MR. METLITSKY: Okay.

THE COURT: Do you have a handset that you could use?

MR. METLITSKY: You know, let me -- let me -- can I -- I'll try to dial back in from another telephone and -- and see if that works better if that's okay.

THE COURT: Yes, please.

MR. METLITSKY: Okay. One second.

(Pause in the proceedings)

THE COURT: Counsel, while we're waiting for Mr. Metlitsky to dial back in, could the rest of us mute our phones in case we're getting feedback from any one of those phones? Thank you.

(Pause in the proceedings)

THE COURT: Mr. Metlitsky --

MR. METLITSKY: Hello?

THE COURT: -- can you hear me?

MR. METLITSKY: Yes.

THE COURT: This -- this is Judge Rice.

MR. METLITSKY: Yes, your Honor. Sorry about that. Can you hear me?

THE COURT: Yes.

MR. METLITSKY: Okay. Apologize. Apologize, your Honor.

So as I was saying, I'd -- I'd like to start with the -- the point about standing and Major Clarkson's adequacy, generally, to represent any of these classes; and I'd like to start with the declaratory relief claims. We think he doesn't have standing pretty clearly to seek any sort of declaratory relief. The Ninth Circuit rule is where a party is seeking injunctive or declaratory relief, she must demonstrate that she is realistically threatened by repetition of the violation. And, here, Mr. Clarkson is no longer a Horizon employee and he's retired from the military, which means there's no realistic threat of any repetition of any of these violations at all.

Now, he says that he's a retired member of the military, which means that, in theory, he could be recalled; but the DOD regulations make clear -- I'm quoting -- that "Regular and Reserve retired members may be used as a manpower source of last resort after other sources are determined not to be available or a source for unique skills not otherwise obtainable." That's DoD Instruction 1352.01 at Page 4.

So there's no realistic possibility that Major Clarkson is going to be recalled for some future military leave, and so he doesn't have any standing to seek declaratory relief.

Now, their major response in their reply brief was, well, they're not seeking any forward-looking relief. That was kind

of a surprising response because Paragraph 28 of their Complaint expressly seeks, quote, "an order requiring [defendant] to comply with USERRA in the future." And the fact that the plaintiffs are willing to jettison that kind of relief by itself calls into question his adequacy to represent the class. I'll get to that in a moment.

But, in any event, it's -- it's, basically, a non sequitur because declaratory relief for purposes of standing is always forward looking because the point of it is to clarify the parties' rights; and that only matters if there's some kind of realistic threat of a violation in the future. If there's not, all you need is damages to remedy past violations, which is why the Ninth Circuit precedent just -- clearly is that, where a party is seeking injunctive or declaratory relief, they have to show a realistic threat of a repetition in the future.

So we think he's got no standing to seek declaratory relief, and so the question is whether he can adequately represent a money-damages class. The answer to that is "No" for several reasons. The first is claim splitting. So, you know, obviously, if he's gonna -- he would have to drop his equitable claims to represent a money-damages claim. And there's a lot of precedent within this Circuit that you can't do that; that a plaintiff that needs to claim split is inadequate because he puts his absent class members at risk of preclusion.

We cite several of these cases at Pages 8 to 9 of our

brief. There's another case we don't cite, for example, called *Beal against Lifetouch* that's 2012 WESTLAW 3705171. They cite out-of-circuit cases that say you can claim split in the -- in the class-action context. That doesn't appear to be the law of this Circuit; and it doesn't really make any sense to me because, after all, a class action is just a mechanism to aggregate individual claims. And so if you have a thousand individuals with split claims, that just means you have a thousand individuals in the aggregate that are at risk of preclusion in the future. And a plaintiff, by definition, who's willing to risk precluding absent class members from seeking relief, especially relief that's available -- that's being asked for in his own Complaint, is an inadequate class representative.

But, you know, the Court doesn't really have to decide that question because there are two other reasons why Major Clarkson is an inadequate class rep. One is, again, as I said, he's willing to jettison relief that he expressly asks for in his Complaint. And there are -- you know, they did that in their reply brief; and there are cases out there within this Circuit making clear that that is itself a reason to deem a class member inadequate. One is *Park against Webloyalty*. That's 2019 WESTLAW 1227062. Another is *Western States Wholesale against Synthetic Industries*, 206 F.R.D. 271. Another is *Tasion against Ubiquiti Networks*, 308 F.R.D. 630. Those are from the Southern, Central, and Northern Districts of California. So that's

another reason why Major Clarkson is an inadequate class rep.

And then the final reason has to do with this differential pay point that Mr. Barton just mentioned at the end. So we argued in our opposition Mr. Clarkson doesn't have standing because he testified that he made about the same money -- amount of money or less at the airlines as he did in the military. And we said, well, the -- the regular remedy is differential pay; and so he can't bring his claim because his injury wouldn't be redressed.

They responded that, actually, the remedy is full pay, meaning that he could get double recovery. He gets to get everything that he would have made working at Alaska plus what he made working for the military.

Now, the Court doesn't have to decide whether that's wrong or right right now. We think it's pretty clearly wrong. For example, the Supreme Court in *Monroe against Standard Oil* -- that's 452 U.S. 549 -- in interpreting a USERRA predecessor statute and holding that military -- paid military leave as a general matter is not required. One of the reasons that's true is because Congress did not intend for, quote, double compensation for such periods, which is exactly what the plaintiffs would be asking for.

So they would have to make this very aggressive argument for the plaintiff in this case to succeed yet many, if not most, class members don't need that argument to succeed. All they

need is differential pay, and yet this plaintiff can't seek differential pay; has no incentive to make any argument for that remedy because he doesn't even have standing to make an argument for that remedy; and, in any event, setting aside Article III intricacies, he just doesn't have any incentive to do it because he won't make any money if that's the remedy.

So it seems to me that, as to the Paid Leave Class at least, the fact that they will have to make this very aggressive remedial argument that other class members just don't need to be correct is itself a reason that Mr. Clarkson is an inadequate class representative of -- of the Paid Leave Class at least.

So those are, I think, in a nutshell the standing and adequacy issues that apply to the classes generally. If the Court has any questions there, I'm happy to answer them. Otherwise, I'll move on to the Paid Leave Class and -- and the non-pilots.

THE COURT: Please move forward.

MR. METLITSKY: Okay. So on the -- on -- on the Paid Leave Class, I think that it's worth just clarifying the basic elements of the claim. This is -- this is the claim that, you know, Alaska, say, provides paid jury duty leave they say; and so, for that reason, they have to provide paid military leave. And so Mr. Barton focused on one of the elements, which is comparability. The jury duty leave has to be comparable to the military leave. And -- and he's right. The duration, purpose,

and voluntariness are the elements there.

But there's another element, which is that the statute requires that the two leaves, if they're comparable, the employer has to generally provide the same benefits. And so the question in this case, for example -- the way that translates into this case is the civilian leave, let's say bereavement leave, has to be paid and the military leave has to be unpaid. And if either one of those things is untrue, they wouldn't satisfy one of the elements of their claims.

So that's where -- it's that second element where the CBA differences come this. Right? So just to take one example, the pilots' CBA at Alaska does not provide for paid bereavement leave. It provides for -- if you want to take bereavement leave, you can either take an unpaid personal day or you can use your sick leave. Right?

Now, that's not true for flight attendants. Flight attendants, under their CBA, get four days of paid bereavement leave. So that -- just that one type of leave you'd have to absolutely look at both of those CBAs and, of course, the CBAs of the other workgroups to figure out what you actually get on bereavement leave.

There's other examples that demonstrate not just that you have to look at different CBAs but that pilots' CBAs, in particular, are extremely complicated. So, for example, if you look at reserve pilots for Alaska and jury duty, it's -- they

don't get paid for jury duty. What happens is they have to work a minimum -- be available a minimum number of days; and if they get jury duty and it brings them below the minimum threshold, that doesn't -- they still get the minimum amount of pay. But if they -- if they get jury duty on days that would not require them to otherwise go below the minimum threshold, jury duty doesn't affect their pay at all. So, you know, there's no comparable provision for non-pilot CBAs.

So those are just sort of a few examples of why you absolutely have to look at the different CBAs. And if there was a trial here, you would have to introduce all of them. And not just introduce all of them but you would have to ask the jury to construe and understand all of them.

And so we think, obviously, there's a commonality and a problem and -- excuse me, predominance problem as to that element, especially the -- what is actually provided on these various sorts of leaves.

Now, as to the comparability element, Mr. Barton mentioned that duration -- and he contrasts that with frequency of the leaves. But I don't understand the difference between those two. The -- the point is just that pilots take a lot more leave individually than people in other workgroups. And so the argument that a pilot has to make -- so, for example, I -- I think Major Clarkson took, like, a hundred and something days of -- of military leave in 2017 before he left Horizon. You

know, he testified that this was like a second career. You know, military leave for -- for pilots. A parallel career for pilots. And, you know, that's -- I think it's undisputed that that's not true for the other workgroups. And that matters for duration because, you know, 150 days or 60 days or whatever it is of a leave is a lot different than, say, two weeks of leave, right, when you're comparing it to the kind of leaves that they're relying on, like, bereavement leave where people hopefully don't take too much of that, you know, ever and, certainly, not in a particular year.

And so I think their -- their response is that you're only supposed to look at the duration of each snippet of leave. So if you take two weeks of leave ten times a year, the relevant duration is not 120 days a year but 2 weeks.

And, you know, again, the Court doesn't have to resolve that argument; but it seems like a pretty aggressive argument to me after all the fact that Congress might have intended that, if an employer gives paid jury duty leave where he expected an employee to be gone for maybe a week, that he has to give -- that the employer also has to give paid military leave for approximately the same amount of time is a lot different than saying if an employee -- if an employer provides for paid military leave for a week of jury duty, he now has to provide paid military leave for, you know, ten weeks or seven weeks or whatever of military leave.

And the point from a class action perspective is that pilots can't win the case unless they're right about that more aggressive argument. And they have no incentive to make the less aggressive argument, which would help the other -- the -- you know, the non-pilot workgroups because the non-pilot workgroups don't need that extremely aggressive argument or at least need it less, right, just because they take less military leave. So that seems to me to go to the comparability point and -- and make it clear that pilots are very differently situated than non-pilot groups for purposes of class certification.

So those -- those are the major arguments for -- for the Paid Leave Class. It's also, I would say -- one other thing on that. It's not true that a -- that a class representative can be an adequate -- excuse me, that an individual can be an adequate class representative if he knows nothing about absent class members. The cases that they cite say that you don't need personal knowledge of the experiences of each of their fellow class members. And that's, of course, true. But in their brief, you know, they -- that's the *Delagarza* case I'm citing -- they, you know, bracketed out each of their fellow class members and just said, [other class members] in brackets. That's a completely different concept. Yes, it's true you don't need to have knowledge of every single class member; but it seems to me that you should at least have knowledge of some of them. Right?

And that's, for example, the *Burkhalter* case that we cite. One of the reasons the plaintiff was inadequate was because he had no conception of the class of people he purportedly represents. And that's sort of concededly true in this case as to anybody other than pilots. So that's a third reason that he can't represent a Paid Leave Class beyond pilots.

So as to the Virtual Credit Class -- so I think part of the dispute there is I think maybe the first question that -- that your Honor asked: What is the actual violation? Right? The statute. So, for example, Section 4313 is about re-employment. The proper re-employment position after you come back from a leave. And so their claim there has to be that he was re-employed into a reserve position rather than the regular line. Right? That -- they have to demonstrate that to win their claim as far as I understand their claims.

The same thing with 4316(c). That one is about circumstances in which you can't discharge a returning service member, but Courts have construed discharge to include denote. So you have to show some kind of demotion or that you were put in the wrong employment position or -- or whatever.

And so that -- that aspect of their claim poses a problem for class certification because the way this -- the system works and the way it interacts with the Virtual Credit Policy is that it is necessary for a pilot to -- to bid, you know, more than 70 hours to -- to get on the regular line; but it's not

sufficient. Somebody who -- who bids 70 hours, including, you know, less than 70 but he -- but he gets brought over the line through virtual credit, is eligible for the regular line; but there is a minimum number of reserve slots that have to be filled at Horizon every month. And even people that satisfy that 70-hour threshold may not -- may be bumped down to the reserve status. For one thing, they might ask for reserve status in which case they'll get reserve status. And, for another thing, if people above them of greater seniority have preferences that trump, those people will get on the -- on the regular line; and they will get reserve status.

And so what that means is that only in some cases will the credit policy that is -- will it make any difference? In other words, if you've got more credits for military leave than the two-and-a-half credits that they got under the pre-February 2018 Horizon policy, would make any difference to their claim at all. Right?

So once you understand that, I think the class cert issues become a little clearer.

So for numerosity, if you just look at up to the February 2018 policy, there are, I believe, 16 people who fall into the following category: People who took military leave in a particular month and ended up on the reserve line in a particular month -- or ended up with reserve status in a particular month. Now, that's the maximum number of people that

could have been -- that could be in the class.

But the fact that they had military leave and were -- had reserve status in the same month doesn't mean that the credit policy had anything at all to do with that. So tops is 16. It's probably lower than that.

Now, the way they want to fix this problem is extending the class past February 2018. But, as your Honor mentioned, there was a new policy after 2018. Major Clarkson was never subject to that policy because he was gone by that point. And when he emailed the Union executive about the new policy -- the new policy was collectively bargained by the Union to account for some of the types of problems that -- that the plaintiff is raising in this case and the response was that the policy is, quote, working out very well and the Union was, quote, not aware of anyone being awarded reserve when they have seniority to hold the line under the new policy, which means there's no reason to believe that there's any substantial number of people that were affected by the new policy beyond the people that were affected, however many that was, before February 2018.

So I don't think extending the date really solves any numerosity problem. You have a very small number of even potential class members and no reason why it needs to be litigated as a class.

As to commonality or -- and predominance, the issue is, because you have no idea whether the Virtual Credit Policy by

itself would have affected you in any way -- would have affected whether you got regular line or reserve status. To figure that out -- and that -- that's not just the question who's in the class. That's a question of whether there's been a violation. Right? That's an element. To figure that out, you have to rerun every pilot's preferences, you know, hypothetically based on the new amount for, you know, whatever -- whatever number of credits they say should have been allocated per day to military leave and see what would have happened. Right? So it -- it's true that those are in the company's business records, but I don't see how that could make those analyses any less individualized. After all, you have to start with Pilot A, who's potentially in the class, and figure out what would have happened to Pilot A under the system if the Virtual Credit Policy were different. Okay. Now you know. Now you have to go to Pilot B and rerun it all over again. Right?

So that is the -- the commonality and predominance problem or -- for the Virtual Credit Class.

If the -- if the Court has any questions, I'm happy to answer them; but that's -- those are the basic points.

THE COURT: No. Thank you. I have no questions.

Mr. --

MR. BARTON: Your Honor, may I respond?

THE COURT: Mr. Barton, I'll just give you a minute or two in reply.

MR. BARTON: Certainly. Let me just quickly go through.

I think we -- we cited case explain -- I'm gonna start exactly where the defendants started on with respect to the declaratory relief. We cited a case that explained declaratory relief can be both prospective and retrospective.

In terms of claim splitting -- and I think this is the issue -- is they don't cite any Ninth Circuit case. They cite some District Court cases, and I think what they're -- here's why they're different, your Honor: We can obtain damages. No class member who is currently there is gonna be prejudiced in any way. If we win at a jury trial in February 2021 and they continue this practice, no one's gonna be precluded from challenging a practice that they -- adversely affecting them after the Judgment. They can still obtain damages for a claim that arises after that, and they can obtain prospective relief if somebody wants. And any determination that we get out of a jury that determines that the practices are illegal only helps somebody with a claim for prospective relief.

With respect to differential pay, defendants made a statement that many class members only need differential pay. There is no evidence in the record to support that. That's just argument. There's nothing that supports that. They have cited nothing in their brief. It's just a statement that they've made.

With respect to the Paid Leave Class, I think the most -- the first point that I want to make is, with respect to commonality, defendants appear to concede -- and I think, with respect to all the elements, they appear to concede that a pilot-only class can be certified here. So we're really talking about whether or not you can certify beyond a pilot-only class.

Their argument with respect to the CBAs really goes to whether -- comparing military -- unpaid military leave with respect to one group versus the other group. We don't disagree. We're not gonna make an argument that flight attendants should be entitled to comparability as to what some other pilot -- some pilot gets or that pilots should be entitled to what flight attendants get for other paid leave. It's the comp -- the particular type of leave the military leave is comparable to within that group. That's the only thing the statute says, and that's the argument that they're making. But it doesn't get into the minutiae that they want to get into.

With respect to duration versus frequency, again, they're -- they made an argument that other groups don't need to have the same frequency; and they don't seem to understand the difference between duration and frequency. And the -- their own client -- their witnesses did. It's the length of leave versus how often you take it.

With respect to the knowledge of the class representative, the *Burkhalter* case that they cite? That's a case where the

individual class representative didn't have enough information about his own claim, not about the claims of class representatives.

With respect to the Virtual Credit Claim, I think they're having an overly narrow reading of the statute. It's a change in status. It does not have -- and the status change is the amount of not properly crediting them and not merely the fact that they become a -- demoted to a reserve status. It's that change of status is not appropriately credited. That's the way to read the statute.

Just a couple other points, your Honor. They're really talking about how -- again, they're talking about how to identify people. Their own representatives -- their own 30(b)(6) representatives told us that you can make those determinations in terms of identifying who was harmed by the policy -- the Virtual Credit Policy -- by the data. The problem is, at least at the time of the motion for class certification, they hadn't produced the data. But they -- they admitted -- their own representative admitted that it is available in the data. The fact that we have to go through and make an analysis doesn't make it not predominant. It's simply a damage calculation.

And with respect to the statement, which is a hearsay statement, that is in their own. They cite it in the brief and they claim the post-2018 policy was, quote, working out well.

They asked Mr. Clarkson at his deposition if he knew specific people that were experiencing the policy post-2018. He identified two of them. We then went and got a Declaration from one of them, and that is attached in our reply brief. It establishes the 2018 matrix that still applies. The same policy but with a different number in it. It still has a problem with respect to people on military leave.

And unless the Court has further questions, I will rest there.

THE COURT: Mr. Barton, have you had a chance to look at the pending motion to amend the jury trial scheduling order and the proposed new dates at Pages 1 and 2 of that motion?

MR. BARTON: That's -- it's actually our motion, your Honor. So, yes, I have.

THE COURT: Oh, all right. And then I apologize.

MR. BARTON: That's okay.

THE COURT: Mr. Metlitsky, have you had a chance to look at that motion; and what are your objections or observations?

MR. METLITSKY: Mr. Morales, do you want to take that one?

MR. ROBERTSON: Yeah. This is, your Honor, Mark Robertson for defendants on the line. Apologize for the echo.

But, yes, we've reviewed that. And we submitted a short

opposition, your Honor, basically making the point that a four-month extension when the entire basis is provision of class member data and we don't yet have a class cert decision is premature. And I think, until we get that ruling, neither party is really in a position to know how much additional time, if any, is needed.

But even if you certify the entire class -- and, obviously, for the reasons outlined today by defendants, we certainly don't believe you should -- I'm not even sure even then a four-month extension is necessary.

But the bottom line is, in our view, that it's premature until a decision is issued.

THE COURT: All right. Well, I intend to get the class certification order out promptly. And because of the COVID-19 pandemic, it appears to me that this -- this continuance is reasonable.

So I'm going to enter an order continuing these dates substantially similar to the proposal. And, if necessary, that can be modified for good cause later.

Thank you, Counsel, for your arguments. I'll get my orders out as soon as I can.

MR. BARTON: Thank you, your Honor.

MR. METLITSKY: Thank you, your Honor.

(Court adjourned at 11:07 a.m.)

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None	

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None	

EXHIBIT INDEX

NO.	DESCRIPTION	ADMITTED
None		

C E R T I F I C A T E

I, RONELLE F. CORBEY, do hereby certify:

That I am an Official Court Reporter for the United States District Court for the Eastern District of Washington in Spokane, Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on the first page hereto; and

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 8th day of December, 2020.

RONELLE F. CORBEY, RPR, CRR, CCR
Washington CCR No. 2968
Official Court Reporter for the
U.S. District Court for the
Eastern District of Washington in
Spokane County, Washington